of the parties. *Everly* v. *Moore* (1860) 24 How. 147; compare *Lavery* v. *Comm.* (1882) 101 Pa. St. 560. Before the adoption of the present Code of Criminal Procedure in New York the objection that no crime was charged in the indictment could be taken for the first time in the appellate court, *Fellinger* v. *People* (1863) 15 Abb. Prac. 128, and this without any assignment of error. 2 Rev. St. p. 741, § 23. Sec. 515, Code of Crim. Proc., substitutes the appeal for the writ of error. Sec. 331 provides that all of certain objections, enumerated in Sec. 323, may be taken only on demurrer, except objections to the jurisdiction of the court and the sufficiency of the indictment, which may be taken at the trial, under a plea of not guilty, and in arrest of judgment. As a matter of interpretation there is nothing either in Sec. 331 or Sec. 323 requiring for them an interpretation that the right existing under the former statute is now excluded, but if there is, an indictment which does not charge a crime is so faulty that it cannot be cured by amendment; *People* v. *Mahoney* (1903) 88 App. Div. 294; that is, before conviction a new indictment must be found, and any judgment by the court on the faulty indictment would be without the jurisdiction to which it is confined by the Constitution. Such a judgment is void—it may be attacked at any time and collaterally—*Dicks* v. *Hatch* (1860) 10 Iowa 380, and to interpret Sec. 331 as allowing this objection to be taken only at the times named would give it an interpretation repugnant to the Constitution.

The principal case finds direct support in *State* v. *Malish* (1895) 15 Mont. 506, and in *State* v. *Hinckley* (1895) 4 Idaho 490, following the Montana court; but in neither of these cases nor in the principal case was the constitutional question raised, and that consideration would seem to require the conclusion reached in *Newcomb* v. *State*, supra. See *State* v. *Meyers* (1889) 99 Mo. 107; *Moore* v. *People* (1888) 26 Ill. App. 137.

Damages and Profits in Actions for Infringement of Trade Mark or Trade Name.—The Circuit Court of Appeals has recently indicated that the proper measure of damages in cases of infringement of trade mark or trade name is the profit which the plaintiff would have made by the sale of the same quantity of the genuine goods as the defendant has sold of the spurious. *Walter Baker & Co.* v. *Slack* (1904) 130 Fed. 514.

If the court intended to lay down the rule above stated as a general one, it seems difficult to sustain it either on principle or on authority. It is believed that no decided case has gone to the length there suggested and it is not clear on what ground such a decision would be sustainable. To assume that every sale by the defendant was the loss of a sale to the plaintiff would be to violate the basic principle that the plaintiff is entitled to only such damages as he can prove; and no such assumption will be indulged by the courts. *Leather Cloth Co.* v. *Hirschfield* (1865) L. R. 1 Eq. 299; *Atlantic Milling Co.* v. *Rowland* (1886) 27 Fed. 24; *Shaw & Co.* v. *Pilling & Son* (1896) 175 Pa. St. 78. Nor is the court's position strengthened by saying that since the plaintiff's loss rather than the defendant's gain should be the measure of damages, the plaintiff's profit on the sale of an

equal amount of his goods, not the defendant's profit actually made, should be the measure of damages. Upon granting an injunction to restrain infringement, a court of equity will grant an accounting of the defendant's profits. This is a remedy entirely distinct from the giving of damages. *Lever* v. *Goodwin* (1887) 36 Ch. D. 1; *Leather Cloth Co.* v. *Hirschfield*, supra; *Henessy* v. *Wilmerding-Loewe Co.* (1900) 103 Fed. 90; Suth. on Dam., 3d ed., § 1201. It is purely equitable and is given on the theory of a constructive trust. *Addington* v. *Cullinane* (1887) 28 Mo. App. 238; Suth., supra. In an accounting of profits, the defendant's gain is the measure of recovery, and the plaintiff's loss immaterial; where legal damages are given, even in a court of equity, the plaintiff's loss is the only essential factor. That the two forms of recovery are entirely distinct the court seems to have overlooked. Even if the law were, as was held in *Graham* v. *Plate* (1871) 40 Cal. 593, on a mistaken analogy to confusion of goods, that the defendant's profits were a proper measure of damages, it is difficult to see how the principal case would be an improvement, for it would only substitute for what the defendant gained what the plaintiff did not lose.

Whether the measure of damages suggested might under certain circumstances be a proper one is a more difficult question. The facts in the principal case are perhaps of frequent occurrence. The defendant was a retail grocer selling the complainant's products as well as the infringing goods. Here the court might have found that the defendant would have sold the complainant's goods in almost every case in which the spurious goods were sold, if he had not also had the spurious goods on sale, and yet have found that the complainant's goods would not have been sold in every case except by the defendant's agency. Is the complainant entitled to recover for loss of profits which it could have made only by the defendant's voluntary act? Besides the incongruous result of taxing the infringer who also sells the genuine article for heavier damages than one who does not, the court would seem to be granting damages not caused by the unlawful act but only by the concurrence of an unlawful act and an additional lawful act. Might not the court refuse such recovery on the ground that the selling of the spurious did not cause the damage, and that the defendant's further act of failing to sell the genuine goods was entirely lawful?

CONTRACTS OF LABOR UNIONS IN NEW YORK.—The right of workingmen to organize and to co-operate in order to advance their interests is generally recognized. But there is the greatest uncertainty as to the extent to which such organizations may go in their competition with capital and with each other. The Court of Appeals of New York has taken the position that a union may refuse to allow its members to work with members of a rival union and may strike or threaten to strike if the latter are not discharged. In case the employer under this pressure actually discharges the men objected to neither they nor the organization of which they may be members have any right of action against the rival union or its members, provided no force is employed nor any unlawful act committed. *National Protective Assn* v. *Cumming* (1902) 170 N. Y. 315. See also *Wunch* v. *Shankland* (1901) 59 App. Div. 482.